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Magic Beans, LLC and International Brotherhood of Teamsters, Local Union No. 25, Petitioner. Case 1–RC–22148

July 18, 2008

DECISION AND CERTIFICATION OF
REPRESENTATIVE

BY CHAIRMAN SCHAMBER AND MEMBER LIEBMAN

The National Labor Relations Board has considered an objection to an election held on November 20, 2007, and the hearing officer's report recommending disposition of it.¹ The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 4 for and 3 against the Petitioner, with no challenged ballots.

The Board has reviewed the record in light of the exceptions and briefs, and has decided to adopt the hearing officer's findings, conclusions, and recommendations only to the extent consistent with this Decision and Certification of Representative.

On the day of the election, prior to the beginning of his shift, employee Robert Collum went to his worksite, but did not punch in as employees customarily did. Instead, he voted in the election, left a note of resignation for his supervisor, and then left the premises. Collum admittedly did not intend to work that day, nor did he actually perform any work. He also admitted that he timed his resignation to ensure that he voted in the election first.

Collum had worked his last full shift on November 15; he was either not scheduled to work or excused from work between November 15 and 20.

A few days before the election, Collum told his co-worker, Chris Gonsalves, that "[his] plan was to go and do what [he] had the right to do, which is vote, and then [he] was going to resign." Gonsalves was later appointed the Petitioner's election observer. There is no evidence that Gonsalves knew, before Collum had voted, that Collum had not performed any work before voting, that he did not intend to perform any work afterwards, or that he intended to resign that same day. Neither party challenged Collum's ballot on November 20.

¹ Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Schaumber and Member Liebman constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

After the election, the Employer filed a timely objection alleging that the timing and manner by which Collum voted and resigned prevented the Employer from making a timely challenge to his ballot. In effect, this objection was a postelection challenge to Collum's eligibility to vote in the election.

In order to promote election finality, the Board has long required that challenges to voter eligibility be made prior to the actual casting of ballots. *Lakewood Engineering & Mfg. Co.*, 341 NLRB 699, 700 (2004). An exception to this prohibition exists where the party benefiting from the Board's refusal to entertain the issue (1) knew of the voter's ineligibility; and (2) "suppressed the facts masking the need for a challenge." *Id.* See also *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 333 (1946) (same).

The hearing officer found that the Employer's objection fell within this exception. According to the hearing officer, the Petitioner's observer, Gonsalves, knew Collum had worked for the last time prior to the election, but the Employer's observer did not, and therefore did not know to challenge Collum's eligibility. The hearing officer apparently concluded on that basis that the Petitioner suppressed the facts concerning Collum's eligibility, thereby preventing the Employer from challenging his ballot. We disagree.

Contrary to the hearing officer, we find that the Petitioner was not on notice, prior to the election, that Collum may have been ineligible to vote.² An employee's eligibility to vote is determined by whether he was employed and working in the bargaining unit on the eligibility date and date of the election. *Roy Lotspeich Publishing Co.*, 204 NLRB 517, 517–518 (1973).³ Here, Collum was employed and working on the payroll eligibility date. He was also employed and working when he made the statement to Gonsalves.⁴ Although Gonsalves was aware that Collum intended to resign after the election, the fact that an employee intends to quit after an election, and does in fact quit, does not affect his eligibility to vote. *Personal Products Corp.*, 114 NLRB 959, 961 (1955) (overruling a challenge to a ballot where the employee gave notice to the employer that she would terminate her employment 2 days after the election). See also *Saint-Gobain Industrial Ceramics v. NLRB*, 310

² The hearing officer found that Collum was ineligible to vote. The Petitioner excepts to this finding; however, we find it unnecessary to reach that issue in light of our determination that the Petitioner did not suppress any information regarding Collum's eligibility.

³ The Board defines "working" as the actual performance of bargaining-unit work. *Sweetener Supply Corp.*, 349 NLRB No. 104 (2007).

⁴ The parties dispute Gonsalves' agency status. The hearing officer did not make a finding as to whether Gonsalves was the Petitioner's agent. It is unnecessary to resolve the issue because we would reach the same result regardless of Gonsalves' agency status.

F.3d 778 (D.C. Cir. 2003) (employee's plan to leave his job after election and use of vacation time to allow him to start a new job and still vote in the election did not affect his eligibility).

Moreover, there is no evidence that the Petitioner knew, before Collum cast his ballot, what he had done at work that day before he voted or what he intended to do afterwards. A fortiori, there is no basis for finding that the Petitioner suppressed any information relevant to Collum's eligibility. The Employer's postelection challenge must therefore be rejected. *NLRB v. A.J. Tower Co.*, supra; *Saint-Gobain Industrial Ceramics v. NLRB*, supra at 781–782 (postelection challenge to eligibility rejected where the evidence failed to show that, prior to the election, the union knew of and suppressed information of the employee's possible ineligibility).

Accordingly, we shall overrule the Employer's objection to Collum's eligibility and issue the appropriate certification of representative.⁵

⁵ Chairman Schaumber would permit a postelection objection in rare cases, such as this, where neither party could have known of an employee's ineligibility prior to the employee's casting of a ballot. He recognizes, however, that overruling the objection here is consistent with extant Board law, which he applies for institutional reasons for the purpose of deciding this case.

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for International Brotherhood of Teamsters, Local Union No. 25, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All full time and regular part time warehousemen/drivers employed by the Employer at its 155 North Beacon Street, Brighton, Massachusetts facility, but excluding all other employees, guards, and supervisors as defined in the Act.

Dated, Washington, D.C. July 18, 2008

Peter C. Schaumber, Chairman

Wilma B. Liebman, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD